SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1418~~ 182

ALAN E. KLIGERMAN, GEORGE A. KLEINHANS, ROBERT E. JEFFRIES and CLIFFORD J. HOGAN,

Petitioners,

vs.

JOHN A. LYNCH, President of the Senate of the State of New Jersey, etc.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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IN THE

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Alan E. Kligerman, George A. Kleinhans, Robert E. Jeffries, and Clifford J. Hogan, your Petitioners pray that a writ of certiorari issue to review the order of the Supreme Court of New Jersey, entered in the above entitled case on February 28, 1967.

Opinions Below

The opinion of the Honorable John B. Wick, sitting as Judge of the Superior Court, Chancery Division, Atlantic County, New Jersey is reported at 92 N. J. Super 373, 223 A. 2d 511 and is set forth in Appendix A hereto, *infra*, page 16. (Kligerman, et al. v. Lynch, et al.)

The order of the Superior Court of New Jersey, Appellate Division, dismissing the appeal from the Chancery Division is set forth in Appendix A hereto, *infra*, page 22.

The order of the Supreme Court of New Jersey dismissing the appeal from the order of the Appellate Division is set forth in Appendix A hereto, *infra*, page 24.

Neither the Appellate Division nor the Supreme Court rendered formal opinions.

Jurisdiction

1. The judgment of the Supreme Court of New Jersey was entered on February 28, 1967 (infra, Appendix A, page 24). It is final by its terms.

2. The Federal Question was raised in the Complaint (*infra*, Appendix A, page 13).

3. The jurisdiction of this Court is invoked under 28 U. S. Code § 1257 (3).

Questions Presented

The New Jersey State Senate adheres to a custom known as "Senatorial Courtesy". Under this custom, when the Governor nominates a candidate for Judicial office, the Senator elected from the home county of the nominee may foreclose consideration on the merits of the nominee by simply stating he objects to the nominee for personal reasons. The New Jersey Constitution in Article 6, Section VI (1) empowers the Governor to nominate and appoint certain Judges with the advice and consent of the Senate. A nominee from Atlantic County was rejected because of Senatorial Courtesy. The same candidate was subsequently re-nominated, confirmed by the Senate and sworn in as a County Judge. The questions presented are:

1. Whether the use of "Senatorial Courtesy" as a substitute for advice and consent violates the due process clause of the Fourteenth Amendment.

2. Whether the subsequent appointment and approval of a single candidate once rejected because of Senatorial Courtesy makes moot any matter concerning Senatorial Courtesy so that citizen-taxpayers are then precluded from questioning the practice or whether such holding of mootness without considering the scope of Senatorial Courtesy or advice and consent violates the due process clause of the Fourteenth Amendment.

3. Do the plaintiffs have standing in a suit to question the rejection by the New Jersey State Senate of a nominee for Judicial office where the plaintiffs are not themselves nominees.

Constitutional Provisions Involved

Article VI, Section VI(1) of the New Jersey Constitution provides:

> "The Governor shall nominate and appoint with the advice and consent of the Senate, the chief Justice and Associate Justices of the Supreme Court, the Judges of the Superior Court, the Judges of the County Courts and the Judges of the inferior courts with jurisdiction extending to more than one municipality. No nomination to such an office shall be sent to the Senate for confirmation until after seven days' public notice by the Governor."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law;"

Statement of the Case

On or about April 4, 1966, the Honorable Richard J. Hughes, Governor of the State of New Jersey, pursuant to Article VI, Section VI(1) of the New Jersey Constitution, duly nominated David M. Perskie, Esquire, of Margate

City, County of Atlantic, to be a Judge of the Atlantic County Court. The seven (7) day notice required by Article VI, Section VI(1) of the New Jersey Constitution was given.

On or about June 6, 1966, the nomination was brought to the floor of the Senate for vote, 60 days having passed from April 4, 1966, and no action having been taken by the Judiciary Committee. This procedure was taken in accordance with Rule 75 of the New Jersey State Senate (See Appendix B).

Prior to the vote, Frank S. Farley, State Senator from Atlantic County, stated on the floor of the Senate that he objected to the candidate for personal reasons, although he admitted the candidate was well qualified. He thus invoked the custom of Senatorial Courtesy.

The operation of Senatorial Courtesy is simple. The Governor, after endless research, appoints a man he considers best qualified by judicial ability and temperament to a judgeship. The nomination goes to the Senate Judiciary Committee (Senate Rule 74). The Senator representing the home county of the nominee (whether such Senator be a member of the Judiciary Committee or not) has merely to indicate his personal objection to the nominee and consideration of the merits of the nominee is foreclosed.

Under Senatorial Courtesy, a Senator is obliged to follow the vote of the home county Senator, no matter how qualified the candidate may be and no matter how high his character.

Under Senate Rule 75, the Judiciary Committee has 60 days to file a written report recommending confirmation or rejection or to make no recommendation and the report is required to show how each member of the committee voted. If no report is filed in 60 days as was the case here, the matter is deemed to be before the Senate.

Under Rule 76, the question was put to the Senate as follows: "Will the Senate advise and consent to this

nomination?" 15 affirmative votes are required to carry a nomination. No affirmative votes were cast. Nine negative votes were cast and the nomination was declared lost by the President of the Senate who directed the Secretary to transmit the determination of the Senate on this nomination to the Governor.

On or about June 23, 1966, the plaintiffs instituted an action as citizens of New Jersey and residents of Atlantic County asking the Court (1) to declare unconstitutional and void the custom of Senatorial Courtesy used to reject this nomination; (2) to define "advice and consent" as used in the New Jersey Constitution, Article VI, Section VI(1); (3) to order the Senate to cease and desist from using "Senatorial Courtesy"; and (4) for other relief deemed appropriate.

On July 19, 1966, the defendants filed a motion to dismiss the Complaint on the grounds that (1) the Complaint fails to state a claim upon which relief can be granted; and (2) the Court lacks jurisdiction over the subject matter involved.

On September 19, 1966, Governor Hughes for the second time submitted the nomination of David M. Perskie to be a Judge of the Atlantic County Court. The 7 day notice required by Article VI, Section VI(1) of the New Jersey Constitution was given separately on this second nomination.

The matter set forth in the Complaint was argued before the Honorable John B. Wick on September 23, 1966, and on October 20, 1966, the motion to dismiss the Complaint was granted.

Plaintiffs filed the notice of appeal on November 9, 1966, which appeal was docketed in the Appellate Division on November 10, 1966.

On November 28, 1966, the second nomination of the said David M. Perskie, Esq., was unanimously approved

by the New Jersey State Senate and on December 16, 1966, the Honorable David M. Perskie was sworn in as a Judge of the Atlantic County Court. At the swearing-in ceremony in open Court, Senator Frank Farley, who had previously opposed the nomination for personal reasons and had invoked Senatorial Courtesy to defeat the first nomination, said to Judge David M. Perskie, "you're not only qualified but I'm sure you'll serve with honesty and integrity."

On January 11, 1967, the plaintiffs-appellants were served with notice of motion for dismissal of the appeal and coincidentally, on the same date, the printed brief of plaintiffs-appellants was filed with the Appellate Division.

On January 19, 1967, the plaintiffs-appellants filed their Brief in opposition to the respondents' motion to dismiss and at the same time informed the Clerk of the New Jersey Superior Court, Appellate Division, that they would move in the Supreme Court for certification of the Appeal pending unheard in the Appellate Division.

On January 20, 1967, the Motion for Certification was filed in the Supreme Court by the plaintiffs-appellants.

On January 24, 1967, the Appellate Division granted respondents' motion to dismiss the appeal, and on January 31, 1967, the Supreme Court denied the motion for certification.

On February 8, 1967, plaintiffs-appellants filed a notice of appeal from the order of the Appellate Division granting respondents' motion to dismiss the appeal.

On February 13, 1967, plaintiffs-appellants were served with a motion by the respondents to dismiss this appeal.

On February 14, 1967, answering Brief of plaintiffs-appellants, in opposition to defendants-respondents' Motion was filed with the Supreme Court and served on the defendants-respondents.

On February 28, 1967, the New Jersey Supreme Court granted respondents' motion to dismiss the appeal.

The filing of this Petition followed.

Reasons for Granting the Writ

Petitioners believe that this case presents an issue which has never been adjudicated and which should be finally determined so that legislative bodies and citizens who elect them may be guided in the future. That issue involves the scope of "advice and consent" as these words appear prominently in several sections of both the Constitution of the United States and the Constitution of the State of New Jersey.

Petitioners submit that in this case, the Supreme Court of New Jersey by dismissing the Appeal on the ground the matter was now moot has left unanswered a question on the constitutional use of the "advice and consent" clause. Insofar as Petitioners are able to ascertain, a definitive statement by a Court of record on the scope and use of the "advice and consent" clause is not available.

Apparently impressed with the argument that Petitioners had started suit to aid a certain Judicial appointee who had been rejected by the State Senate, the New Jersey Supreme Court in effect, held the matter became moot upon the subsequent re-appointment and approval of the same appointee. Petitioners steadfastly maintain that so long as the New Jersey State Senate continues to hold the power of Senatorial Courtesy, nothing was solved by the seating of any appointee.

Every appointment which the Governor makes subject to the advice and consent clause still hangs on an awaited interpretation. The Governor is in a sense prevented from moving unfettered since Senatorial Courtesy in effect silently dictates to the Chief Executive that his choice of an appointee is limited or circumscribed by an ancient

Senatorial custom—limited to those against whom the Governor must determine that the custom of Senatorial Courtesy will not be adversely used.

Petitioners concede that if all the New Jersey State Senators had exercised their own discretion after due consideration of this matter and reached a conclusion, however wrong or foolish, that conclusion under the separation of powers doctrine would have been unassailable.

The admitted facts here show clearly that this was not done—no judgment was exercised—no consideration given—no thought processes used. Through Senatorial Courtesy, each Senator bound himself *in advance* to be controlled by the thought processes of another.

Petitioners submit that this being the case, even the recent decision of the United States District Court for the District of Columbia would not be applicable. That decision held that the Court, under the separation of powers doctrine, had no power to enjoin the House of Representatives from excluding a citizen from membership in the House.

Adam Clayton Powell, Jr., et al. v. *John W. McCormick, et al.*, U.S.D.C. (DC) Civil No. 559-67 (1967).

Judge John B. Wick, who heard the original argument on the motion to dismiss the Complaint stated in his Conclusions that the framers of the Constitution never intended the advice and consent clause to be used to reject candidates for personal reasons. He felt, however, that the Court had no power to rectify this situation (Appendix A, *infra*, page 17).

Judge Wick in his opinion (Appendix A, *infra*, p. 20) dismissing the matter for lack of jurisdiction said "The recent case of *Bond* v. *Floyd*, 251 F. Supp. 333 (N.D. Ga., 1966), cited by the defendants is directly in point." There the U. S. District Court had dismissed the matter as to two residents of Bond's home county stating that neither

had enough direct interest to give standing to bring the Complaint. Judge Wick thought the plaintiffs in this case no different.

The *Bond* decision was subsequently reversed in 385 U.S. 116 which unanimously held that the First Amendment rights of Bond had been violated by the Georgia legislature when they excluded him from his elected seat because of his open opposition to the Vietnamese conflict. The legislature had purported to act on the basis they could determine the qualifications of its own members.

Chief Justice Warren stated that "legislators have an *obligation* to take positions on controversial political questions so that their constituents can be fully informed by them and be better able to assess their qualifications for office."

Does not the same obligation attach to the consideration of judicial appointments? Can a State Senator by Agreement and Senatorial Courtesy bargain away his duty to consider judicial nominations independently?

It is also interesting to note that in the U. S. Supreme Court Opinion in the *Bond* case, the Court said in footnote 14 "*we need not pass on the standing of two of Bond's constituents who joined in the suit below. The majority below dismissed the complaint as to these two constituents because they lacked a sufficiently direct interest in the controversy as would give them standing. The majority noted that it was appropriate to dismiss the case as to Bond's constituents because Bond's complaint would resolve every issue necessary to a decision in the case. We express no opinion on the question of whether Bond's constituents can claim that concrete adverseness which would be necessary to give them standing.*"

The defendants in their motion to both the Appellate Division of the Superior Court of New Jersey and to the Supreme Court of New Jersey to dismiss the appeal of the

plaintiffs, have based their contentions on the proposition that the matter before the Court is now moot. They contend that plaintiffs were intent on securing the appointment of one, David M. Perskie, as a member of the Judiciary of New Jersey—that subsequent to the filing of the Complaint the said David M. Perskie was sworn in as an Atlantic County (N. J.) Judge and that with this the entire matter is concluded, moot or abstract.

Plaintiffs strongly point out that much more is in issue here than the appointment of a single Judge. An important principle of Constitutional Law is involved in this matter of "Senatorial Courtesy" and as long as the New Jersey State Senate continues to hold the power of Senatorial Courtesy, nothing has been solved by the appointment of the Honorable David M. Perskie.

In *United States of America* v. *W. T. Grant Company, et al.*, 345 U. S. 629, 632, 97 L. Ed. 1303, 1309 (1953), the Government brought suit under the Clayton Act to enjoin certain interlocking directorships. The suit was dismissed after the specific interlocks were ended and any intention to resume them disclaimed. The United States Supreme Court affirmed the dismissal on the ground of mootness.

It is interesting to note, however, that even the majority opinion by Mr. Justice Clark took note of the fact that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot" and "a controversy may remain to be settled in such circumstances . . . e.g. a dispute over the legality of the challenged practices." The majority added that "the defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion."

In the *Grant* case, Mr. Justice Douglas with whom Mr. Justice Black concurred, dissented and, at page 638, said "the fact that the Lehman partner resigned to avoid a

decision on the merits has little, if any, relevancy to the issue in the case, for we are here concerned with the proclivity of the house to indulge in the practice. The relevant issues have never beeen weighed in this case."

We have involved in your Petitioners' plea a very similar situation. Under New Jersey Law, when defendants moved to dismiss the Complaint, they accepted as true for motion purposes that the New Jersey State Senate failed to confirm a judicial nomination; that the sole reason for this was the invoking of the custom of "Senatorial Courtesy" based on personal reasons of the home county Senator as a result of which not one member of the Senate voted to affirm the appointment.

Thus, as in the *Grant* case, when the rejected nominee was later confirmed, the matter of mootness, was raised. *Unlike Grant, however, in this case there is no disclaimer of any intention to use Senatorial Courtesy again* and the problem will continue to defy interpretation or solution until the Court determines the matter. Every appointment due to be made by the Governor of New Jersey which requires the advice and consent of the Senate is still subject to Senatorial Courtesy.

Except for the argument before Judge Wick on motion to dismiss (motion for Summary Judgment) plaintiffs have not had a day in Court to present their case. They maintain this is in violation of the rights granted them by the due process clause of the Fourteenth Amendment; they maintain that by dismissing the appeal on the apparent grounds of mootness, the Supreme Court of New Jersey has denied your Petitioners the right to present the facts and examine the defendants. Petitioners maintain that a rule by the Court on the definition of the power of the Governor to appoint and the latitude of the Senate's power to reject is not an abuse of judicial power.

CONCLUSION

For the reasons stated, it is respectfully submitted that this Petition for Certiorari should be granted.

Respectfully submitted,

PATRICK T. MCGAHN, JR.,
Attorney for Petitioners,
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APPENDIX A

Complaint

Plaintiffs, Alan E. Kligerman, residing at 49 South Plaza Place, Atlantic City, New Jersey, George A. Kleinhans, residing at 118 Devonshire Avenue, Linwood, New Jersey, Robert E. Jeffries, residing at 203 North Princeton Avenue, Ventnor City, New Jersey, and Clifford J. Hogan, residing at R.D. #1 Zion Road, English Creek, Mays Landing New Jersey, complaining against the defendants, say:

1. On or about April 4, 1966 the Honorable Richard J. Hughes, Governor of the State of New Jersey, pursuant to the New Jersey Constitution, Article VI, Section VI(1), duly nominated David M. Perskie, Esquire, Margate City, County of Atlantic, to be a Judge of the Atlantic County Court.

2. The New Jersey Constitution, Article VI, Section VI(1), empowers the Governor to nominate and appoint, with the advice and consent of the Senate, the Judges of the County Courts of the State of New Jersey.

3. At a session of the New Jersey State Senate on June 6, 1966, the nomination of David M. Perskie, Esquire, to be appointed Judge of the Atlantic County Court of the State of New Jersey, was brought to the floor of the Senate for a vote after sixty (60) days had passed without any action by the Judiciary Committee of the New Jersey State Senate and pursuant to the New Jersey State Senate Rules adopted January 11, 1966, and in particular, Rule XV, paragraphs 74 through 78. On that date, after the name of David M. Perskie, Esquire, was read, Senator Frank S. Farley, of Atlantic County announced, "I personally oppose the nomination for personal reasons." No statement was made concerning the nominee's qualifications. Further, no objection was made against the nominee for any professional,

ethical, moral or reason of unfitness for the said office. Thereafter, the roll was called and the Senate failed to advise and consent to the nomination of the said David M. Perskie, Esquire.

4. Plaintiffs charge that the failure to advise and consent to the said nomination was based on the custom of the Senate of the State of New Jersey known as "Senatorial Courtesy," whereby the nomination of a nominee will not be favorably considered unless the State Senator representing the County of residence of the nominee approves such nomination. The Senate failed to advise and consent on the nomination at the behest of his home county senator, Frank S. Farley, and nothing more.

5. Plaintiffs charge that the use of the custom of "Senatorial Courtesy" in acting on the nomination aforesaid, was arbitrary, capricious, had no relationship to the qualifications or integrity of the nominee, was illegal and unconstitutional.

6. Plaintiffs charge that the use of the custom of "Senatorial Courtesy" had no reasonable relationship to and is in violation of the authority authorizing the Senate of the State of New Jersey to determine the rules of its proceedings under Article IV, Section IV(3) of the New Jersey Constitution and its Senate rules, specifically Rule XV, paragraphs 74 through 78.

7. Plaintiffs charge that the New Jersey State Senate is a duly elected public body and that the custom of "Senatorial Courtesy" as used herein to reject the nomination of the nominee violated the New Jersey Constitution, Article I, paragraph 1, and the Constitution of the United States, Amendment XIV, Section 1, insofar as it relates to the rights of the nominee and plaintiffs.

8. Plaintiffs charge that the custom of "Senatorial Courtesy" as used herein, had no reasonable relationship to the powers granted the Senate of the State of New Jersey to "advise and consent" as set forth in the New Jersey Constitution, Article VI, Section VI(1).

9. As residents of the County of Atlantic, the plaintiffs have been injured and denied the services of a qualified judicial nominee by arbitrary, capricious illegal, and unconstitutional acts of the Members of the New Jersey State Senate in that they failed to advise and consent to the nomination of David M. Perskie, Esquire, based solely on the custom of "Senatorial Courtesy."

WHEREFORE, Plaintiffs pray:

That this Court adjudge that the action of the Senate of the State of New Jersey in this matter, in using the custom of "Senatorial Courtesy" as practiced by the present twenty-nine (29) Senators of New Jersey, to reject nominations to judicial office made by the Governor of New Jersey is illegal, unconstitutional and void.

That this Court define the "advice and consent" clause as contained in the New Jersey Constitution, Article VI, Section VI(1).

That this Court order the Senate of the State of New Jersey to cease and desist from using the custom of "Senatorial Courtesy" as a substitute for the constitutional requirements of "advice and consent" contained in the New Jersey Constitution, Article VI, Section VI(1).

And for such other relief as the Court may deem necessary and appropriate.

PATRICK T. MCGAHN, JR.
Attorney for Plaintiffs

Opinion of Superior Court of New Jersey, Chancery Division

MR. PATRICK T. MCGAHN, JR. for plaintiffs.
MR. THOMAS F. CONNERY, JR. for defendants.

(MESSRS. BROWN, CONNERY, KULP AND WILLE, attorneys).

WICK, J.S.C.

Plaintiffs instituted this suit to have certain actions of the New Jersey State Senate declared illegal, unconstitutional and void under Article 6, Section 6(1) of the New Jersey Constitution, which places the appointing power in the Governor with the advice and consent of the Senate. Plaintiffs are residents of Atlantic County and claim that said actions are violative of their rights under Article 1, Section 1 of the New Jersey Constitution and under the 14th Amendment of the Federal Constitution.

Defendants have filed a motion to dismiss the action for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction.

The facts presented in plaintiffs' brief, which must be accepted as true for the purpose of the motion, establish that on June 6, 1966 the State Senate failed to confirm a judicial nomination for the Atlantic County Court; that the sole reason for rejection was for purely personal reasons as expressed by the Senator from Atlantic County; and that because of the said Senator's objection against the said nominee, the custom of "Senatorial Courtesy" was invoked and not one of the members of the Senate voted to affirm the appointment.

Plaintiffs contend that the custom of "Senatorial Courtesy" is an improper exercise of the Constitutional mandate to advise and consent to judicial appointments and that thus this Court has the authority to hear and determine this present case. The Court cannot agree.

Plaintiffs contend that rejection of qualified nominees for personal reasons is so arbitrary as to be incompatible

with the power vested in the Senate and that the framers of the Constitution never intended this check on the appointive power to supplant a properly exercised executive function.

While this Court must agree with the plaintiffs that the Constitutional draftsmen never intended the advice and consent clause to be so used, it cannot agree that it has the power to rectify the situation.

The framers of the Constitution were not blind to the problem here at issue, indeed, those present at the Constitutional Convention of 1844 who opposed the transfer of the appointive power from the joint meeting of the legislative houses to the Governor and Senate relied heavily on this argument. *Proceedings of the New Jersey State onstitutional Convention of 1844*—New Jersey State House Commission 1942. Mahlon Dickerson, from Morris County, pointed to the situation existing at the federal level:

> "Look at the state of things at Washington now, where more than half of the nominations of the President, have been either rejected or suspended. Some of the officers too, are of the greatest importance. Such as Judges of the Supreme Court. I will not say whether the President or Senate is wrong, but the system is wrong, and much mischief grows out of it." (p. 353)

Mr. William B. Ewing of Cumberland County, who originally moved to strike the proposed change from the new Constitution argued in a like manner.

> "But suppose the Governor and Senate should be of different parties. The Governor will only nominate his own political friends and his nominations will be disregarded by the Senate and the offices will not be filled and the people will suffer great inconvenience." (p. 349)

The members of the convention were fully apprised of the dangers inherent under both the existing system and the proposed system, yet they realized that they were powerless to correct or control the abuses. Mr. Field of Mercer County and a proponent of the new system best stated the position of the convention:

> "The subject of the appointing power is one of the most delicate and difficult subjects which the Convention will be called upon to determine. It is surrounded on all sides with difficulties and embarrassments. Place it where you will, it is always liable to be abused—. But we are now called upon to do, what is frequently necessary to be done, make a choice of evils; and we all hope that we shall choose wisely and well." (p. 356)

Can it be reasonably inferred from this language that the Convention meant to invest the Courts of New Jersey with power to correct these abuses when it felt powerless to do so itself. To correct these abuses would, as the defendants point out in their brief, involve delving into the thought processes and motivations which led each individual Senator to vote or not vote as he did.

In short, abuse of power by an elected representative which falls short of violating the Constitution, either Federal or State, or some law of the land, cannot be remedied by a Court of law, but only by electorate. It is clear from the extended debate over the appointing power which took place at the Constitutional Convention of 1844 that the delegates thereto and the eventual framers of *Art.* 7 §2, *par.* 1 (under the Constitution of 1947, *Art.* 6, § 6, *par.* 1 with language variations) never considered or attempted to construe the "advice and consent" clause so broadly as to encompass the present situation. The mere act of confirmation or rejection by the Senate, for whatever reason and in

whatever manner is sufficient to meet the requirements of said clause.

Plaintiffs argue that the "advice and consent" clause requires the exercise of reasonable judgment in forming an opinion. They cite *In re Opinion of Justices,* 190 *Mass.* 616, 78 *N.E.* 311 (1906), to support their position. However that case has no bearing on the present cause of action. The question before the Massachusetts Court was whether, under that section of the Massachusetts Constitution which gave the Governor the power to pardon by and with the advice and consent of the Council, the Governor must initiate the action or whether the Council could move on its own.

Plaintiffs also rely on the case of *Murphy* v. *Casey,* 300 *Mass.* 232, 15 *N.E.* 2d 268 (1938) and refer particularly to page 271 wherein the Court said that "Council in determining whether its advice and consent should be given to the removal of a public officer may adopt any reasonable method of forming a proper judgment". The statute involved set out the procedure to be followed for removal of public officers by the Governor and required that such be done by and with the advice and consent of the Council where the appointment had been so made. However, removal could only be *for cause.*

Similarly the case of *U.S.* v. *Ballin,* 144 U.S. 1 (1892), cited in both briefs, fails to lend any support to plaintiffs' case. In the first place that case dealt with an actual rule of the United States Senate where this Court is concerned with what might possibly be termed an "unwritten rule", but is more properly a custom allegedly practiced by the New Jersey State Senate, and undoubtedly by other legislative bodies throughout the land. Secondly, as established previously, there is no justiciable constitutional question involved in the present case which would support a judicial inquiry into said alleged custom as the very act of rejection by the Senate is *per se* proof of an exercise of judgment which, absent the requirement of a showing of cause, is suf-

ficient to comply with the "advice and consent" clause of our Constitution.

As the plaintiffs have failed to raise a constitutional question, they have failed to state a claim upon which relief can be granted and defendants' motion for dismissal must be granted.

Nor is this the only defect in the plaintiffs' suit for there is a serious question as to whether the plaintiffs have proper standing to maintain this action. They base their claim on the unalienable right of every citizen to ask that his government be properly administered and allege that as citizens of Atlantic County they have been injured by this improper action of the defendants in that it prevents them from obtaining a speedy and efficient determination of legal rights by blocking the appointment of a qualified man to the judiciary in Atlantic County.

Plaintiffs cite several New Jersey cases which uphold the right of a citizen and taxpayer "under appropriate circumstances and without any showing of increased tax burden, to maintain proceedings seeking to remedy wrongful acts of public officials". *Haines* v. *Burlington County Bridge Commission*, 1 *N.J. Super.* 163 (*App. Div.* 1949). However in all the cases cited by the plaintiffs and in all subsequent cases wherein the Courts of New Jersey relied on these cases, the injury of first instance was to the general public and the public would have had to bear the burden of the improper action as a direct consequence thereof.

In the present case, the injury of first instance was to the rejected nominee and only he was directly affected. The fact that he was to have served a public office gave the action of the Senate a secondary effect in that the injury carried over to the citizens of Atlantic County.

The recent case of *Bond* v. *Floyd*, 251 *F. Supp.* 333 (*N.D. Ga.* 1966), cited by the defendants, is directly in point. In that case the Georgia Senate refused to seat a duly elected representative pending investigation of his qualifications. Suit was instigated by said representative and by two resi-

dents of his district. The U.S. District Court dismissed the action of the two residents on grounds that one of them was not registered to vote in that district and that neither of them had "such a direct interest in the litigation as would give them standing to bring the complaint".

It is difficult for this Court to discern any substantial distinction between that case and the case at bar insofar as the issue of standing to sue is concerned. Can it be argued that the interests of the present plaintiffs are more substantial than those of the two residents in the *Bond* case or that the injury here complained of is more direct than the injury inflicted in the *Bond* case. We think not.

In the cases cited by the plaintiffs, the alleged illegal activities of the government were not aimed at any one in particular but were carried on at a higher level so that the injury would fall more broadly on all citizens or so that it could be buried in the maze of bureaucracy and go unnoticed. In such a case it is not only unreasonable but highly unrealistic for the Courts to wait until the government decides to prosecute itself for its own improprieties. But, where an individual citizen or group thereof is directly injured by an alleged unconstitutional abuse of governmental power and said individual or group does not seek redress, it is just as unreasonable for a Court to entertain suits by third parties who do not have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues". *Baker* v. *Carr*, 369 *U.S.* 186, 82 *S. Ct.* 691, 7 *L. Ed. 2d* 110 (1962).

The motion to dismiss the complaint will be granted for the reasons herein stated.

Decided: October 20, 1966.

/s/ John B. Wick,
John B. Wick,
J. S. C.

Order of Superior Court of New Jersey, Appellate Division

ORDER ON MOTIONS/PETITIONS

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Docket No. A-207-66

Motion No. M-286-66

Before Part A

ALAN E. KLIGERMAN, GEORGE A. KLEINHANS, ROBERT E. JEFFRIES and CLIFFORD J. HOGAN,

VS.

JOHN A. LYNCH, President of the Senate of the State of New Jersey, FRANK S. FARLEY, *et al.*

Moving Papers Filed January 10, 1967.

Answering Papers Filed January 19, 1967.

Date Submitted to Court January 23, 1967.

Date Decided January 24, 1967.

ORDER

This matter having been duly presented to the Court, it is hereby ORDERED as follows:

Motion to dismiss appeal Granted.

Order

SUPPLEMENTAL:

Original Filed Jan. 27, 1967,

MORTIMER G. NEWMAN, JR.,

Clerk.

/s/ SIDNEY GOLDMANN,
S. J. A. D.

Witness, the Honorable SIDNEY GOLDMANN, Senior Judge of Part A, Superior Court of New Jersey, Appellate Division, this 24th day of January, 1967.

MORTIMER G. NEWMAN, JR.,
Clerk of the Superior Court.

Order of Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY

M-226 SEPTEMBER TERM 1966

On Motion to Dismiss Appeal

ALAN E. KLIGERMAN,
Plaintiff-Appellant,

vs.

JOHN A. LYNCH,
Defendant-Respondent.

This matter having been duly presented to the Court, it is Ordered that the motion to dismiss the appeal is granted.

Witness, the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton, this 28th day of February, 1967.

Filed Feb. 28, 1967,

JOHN H. GILDEA,
Clerk.

A True Copy

JOHN H. GILDEA,
Clerk.

APPENDIX B

N. J. State Senate Rules, 1966

* * *

XV—Nominations

74. When nominations shall be made by the Governor to the Senate, they shall, unless otherwise ordered by the Senate, be referred to the Judiciary Committee.

75. The report of the Judiciary Committee concerning any such nomination shall be in writing and shall show whether the same is reported with a recommendation for confirmation or rejection, or without any recommendation, and how each member signing the report voted upon the nomination. Such nomination, however, with or without a recommendation by the Judiciary Committee shall be deemed to be before the Senate for public action at the meeting of Senate following the expiration of sixty days subsequent to the date of receipt of such nomination from the Governor. The President shall place such nomination before the whole Senate in public session at the meeting next following, and may call for the vote of the Senators with respect thereto in the order of his pleasure at that time; provided, however, that if the Senate does not meet within the 60 day period, then the President shall place such nomination before the whole Senate in public session at the second meeting following expiration of the 60 day period.

76. The final question to be placed before the Senate in public session upon every nomination shall be, "Will the Senate advise and consent to this nomination?" which question shall not be put on the same day on which the nomination is received, nor on the day on which it may be reported by the Committee, unless by the unanimous consent of the Senate; provided, however, that an affirmative vote of

at least fifteen Senators shall be necessary to advise and consent to any and all nominations. The names of the Senators voting for and against the nomination and the report, if any, of the Senate Judiciary committee with respect thereto, shall be entered on the journal of the Senate.

77. All information or remarks concerning the character of qualifications of any person nominated by the Governor to office which are brought to the attention of the Judiciary Committee during its consideration of the nomination shall not be made public; provided, however, that any nominee upon written request shall be granted a hearing by the Judiciary Committee in public or private session, at the discretion of the committee which shall then advise the nominee of any objections raised to his confirmation and shall afford him an opportunity to respond thereto, in public or private.

78. All nominations approved by the Senate or otherwise definitely acted on shall, from day to day as such proceedings may occur, be transmitted by the Secretary to the Governor, with the determination of the Senate thereon and the number of Senators voting for and against such nomination; but except for the names of the Senators voting for and against confirmation of such nominee and the report, if any, of the Judiciary Committee, no further extract from the executive journal shall be furnished, published or otherwise communicated, except by special order of the Senate.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

ALAN E. KLIGERMAN, GEORGE A. KLEINHANS, ROBERT E. JEFFRIES and CLIFFORD J. HOGAN,
Petitioners,

vs.

JOHN A. LYNCH, President of the Senate of the State of New Jersey, etc., et als.,
Respondents.

BRIEF IN OPPOSITION TO GRANTING OF A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

Your Respondents pray that a writ of certiorari to review the order of the Supreme Court of New Jersey, entered in the above entitled case on February 28, 1967, be denied.

QUESTION PRESENTED.

In this Brief, in opposition to the granting of a writ of certiorari to the Supreme Court of New Jersey only one question will be argued, that being whether the questions originally presented to the courts of the State of New Jersey have become moot or abstract and thus non-justiciable.

CONSTITUTIONAL PROVISIONS INVOLVED.

Article III, Section 2 of the Constitution of the United States provides as follows:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers, and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party; to controversies between two or more States;—between a State and citizens of another State;—between citizens of different States;—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens or subjects."

COUNTER-STATEMENT OF THE CASE.

The Respondents can join generally in the Statement of the Case contained in the Petition heretofore presented. Respondents do wish to stress, however, that this matter was dismissed at the trial level upon motion made prior to the filing of an Answer. For that reason, and for that reason only, the allegations of the Complaint are to be taken as true. Respondents also point out that at no time was the person most intimately involved in this matter, namely David M. Perskie, ever a party to this suit.

REASONS FOR DENYING THE WRIT.

It would seem axiomatic that in every case wherein it is held that a matter has become moot and as a consequence non-justiciable, questions are left undetermined. That is the situation here. The case has become undeniably moot but it is claimed by the Petitioners that the mere presence of an interesting question unadorned by any actual matters

in controversy is sufficient justification for invocation of this Court's jurisdiction.

Had Petitioners merely submitted a hypothetical question to this Court, there could be no doubt as to the final determination. The Constitution precludes the rendition of advisory opinions. *United States Constitution, Article III, Section 2; Muskrat* vs. *United States,* 219 U. S. 346 (1911). It is Respondents' contention that at this point what Petitioners are seeking amounts to an advisory opinion.

The only case cited by Petitioners to justify their claim that the matter is not moot is *United States of America* vs. *W. T. Grant and Company, et al.* 345 U. S. 629 (1953). That case involved conduct purportedly illegal in that it was contrary to the dictates of the Clayton Act. The Court rightly pointed out that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and decide the case, i.e. does not make the case moot." It would seem clear that mere cessation of illegal activity aimed only at defeating jurisdiction of a court should not, and it was so held in the *Grant* case, render a matter moot.

It is Respondents' contention, however, that the *Grant* case is not dispositive of the situation here involved. Indeed, there is no contention on the part of Petitioners that there has been a cessation of activity for the mere purpose of avoiding adjudication.

Instead, what has occurred here is what occurs normally in cases which are declared moot. Time passes and in the natural course of events the situation giving rise to the litigation disappears.

That is what happened in *Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO, et al.* vs. *Missouri,* 361 U. S. 363 (1960). In that case, an attack was made upon injunctive action taken by the Governor of Missouri pursuant to statutory authority granted to him by the State Legislature. By the time the case had reached the Supreme Court the injunction had expired. The Court refused to rule upon the merits of the case because the matter had become moot. There was before the court no

"actual matters in controversy essential to the decision of the particular case before it." Citing *United States* vs. *Alaska S. S. Co.*, 253 U. S. 113, 116 (1920).

So too, in our present case, there are no actual matters in controversy before the Court. Petitioners entire claim is based upon the failure of the New Jersey State Senate, on June 6, 1966, to advise and consent to the nomination of the Honorable David M. Perskie to be Judge of the Atlantic County Court. The Senate on November 28, 1966, did fill the court vacancy by confirming the same Honorable David M. Perskie and it is contended that this latter occurrence rendered the matter moot. There is absolutely no claim by Petitioners that there is anything but mere abstract questions left to be decided. Nothing that this Court could do would affect in any way the judicial situation in Atlantic County.

It was because this case became moot that both the Appellate Division of the New Jersey Superior Court and the Supreme Court of New Jersey refused to hear the matter They refused to treat with abstractions when dealing with Constitutional questions. This Court should not now presume that if a proper case reached the Supreme Court of New Jersey it might make a determination contrary to sound constitutional law. This Court is urged to allow the Supreme Court of New Jersey, in a proper case, to rule upon questions involving its own affairs prior to United States Supreme Court review. *Allen Bradley Local* vs. *Wisconsin Board,* 315 U. S. 740 (1942).

Respondents do not, by filing this brief, concede that there are no other reasons why Respondents should not ultimately prevail in this matter and Respondents respectfully reserve the right to raise further arguments in the event this Petition is granted.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the requested Petition for Certiorari be denied.

Respectfully submitted,

THOMAS F. CONNERY, JR.,
Attorney for Respondents.